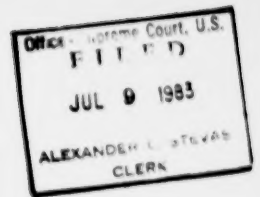


NO. 82-6916



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM BUSH,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI  
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION  
TO CERTIORARI

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### QUESTIONS PRESENTED FOR REVIEW

1. Were petitioner's two confessions in fact voluntary?
2. Did the Alabama appellate courts properly apply United States v. Agurs, 427 U.S. 97 (1976), to the particular facts and circumstances involved in this case.

### PARTIES

The caption contains the names of all the parties in the court below.

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### OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming petitioner's conviction and death sentence, William Bush v. State, No. 3 Div. 494 (Ala. Cr. App. Oct. 12, 1982), is not yet published. A copy of the manuscript opinion is attached as Appendix B to this brief.

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision, William Bush v. State, No. 82-131 (Ala. Feb. 11, 1983), is not yet published. A copy of the manuscript opinion is attached as Appendix A to this brief.

### JURISDICTION

The decision of the Alabama Supreme Court from which petitioner seeks relief was entered on February 11, 1983, and petitioner's timely application for rehearing was overruled on May 6, 1983. Petitioner's scheduled execution was stayed by Justice Powell in an order dated June 21, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

### CONSTITUTIONAL PROVISIONS INVOLVED

The petition addresses issues involving the Fifth and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

The facts of the crime, as found by the trial court in its sentencing order, are as follows:

On July 26, 1981 at approximately 3:05 a.m. the Defendant, William Bush, and Edward Pringle entered a convenience store--Majik Mart--on Carter Hill Road in Montgomery, Alabama. Edward Pringle has capital cases pending against him in this Circuit.

William Bush pointed a pistol at the witness, Tony Holmes, and forced him to the rear of the store where the cashier, Larry Dominguez, was using the restroom. When Dominguez opened the bathroom door, William Bush shot both Tony Holmes and Dominguez with the pistol. Bush shot Holmes in the face and Dominguez in the chest area. Bush then walked to the front of the store and tried to get into the cash register. When Larry Dominguez stumbled out of the bathroom, William Bush shot him again, this time in the face. Larry Dominguez died from the wounds he received. Bush shot Holmes and Dominguez so that there would be no witnesses to the robbery of the convenience store. Bush took two bags of Zodiac sign tags out of the Majik Market.

After the shootings at the Carter Hill Road convenience store, Bush and Pringle drove to another convenience store. The second convenience store was a Seven-Eleven store on Narrow Lane Road in Montgomery, Alabama. Bush bought some cigarettes from the cashier, Thomas Adams, to get him to open the cash register. Then Bush forced Adams to go to a small room--an office area behind the counter. Bush shot Adams in the head with the same pistol he had previously used to shoot Tony Holmes and Larry Dominguez. Thomas Adams died from the wound he received. Bush and Pringle took the money from the cash register at the Seven-Eleven Store.

William Bush v. State, No. 3 Div. 494 (Ala. Cr. App. Oct. 12, 1982), Manuscript opinion [Ms. op.] at 2-3 (quoting R. 682-683) [App. B].

On August 27, 1981, petitioner was arrested and charged with robbery and murder. (R. 20-21, 26, 46, 317, 343) On September 11, 1981, he was indicted by the Montgomery County Grand Jury for the Code of Alabama 1975, §13A-5-40(a)(2) capital offense of "[m]urder by the defendant during a

robbery in the first degree or an attempt thereof." (R. 659-663) At arraignment on September 28, 1981, petitioner pleaded not guilty and not guilty by reason of insanity (R. 670), but he never presented any evidence to support the insanity plea (R. 160-569).

Petitioner's trial began on November 16, 1981 (R. 127), and on either November 17 or 18, 1981 he was convicted of the capital offense charged in the indictment. (R. 570, 680) Thereafter, on that same day, a sentence hearing was conducted before the jury pursuant to Code of Alabama 1975, §13A-5-45, which resulted in an advisory verdict by the jury recommending that appellant be sentenced to death. (R. 571-609, 665) The jury's vote was 12 to 0 for death. (R. 609, 665, 680)

After ordering and receiving a pre-sentence report as required by Code of Alabama 1975, §13A-5-47(b), the trial court on November 25, 1981, held a sentence hearing before the court without a jury pursuant to §13A-5-47. (R. 611-622, 682-683) The trial court then recessed the hearing to consider the matter and enter written findings. (R. 622)

As required by §13A-5-47(d), the trial court thereafter entered written findings concerning aggravating and mitigating circumstances and summarizing the crime and petitioner's participation in it. (R. 681-687) The court found that "the aggravating circumstances overwhelmingly outweigh the mitigating circumstances" and accordingly followed the jury's recommendation that petitioner be sentenced to death. (R. 687) The trial court's written sentence findings were filed on December 1, 1981 (R. 681), and on December 3, 1981, the court formally sentenced appellant to death in open court. (R. 623-626, 688)

On or about December 17, 1981, petitioner filed a motion for a new trial (R. 690-697), and the State thereafter filed

an answer thereto (R. 702-709). After being continued from time to time (R. 696-697), the new trial motion was heard on May 24, 1982 (R. 627-657), and denied the next day. (R. 730)

On October 12, 1982, the Alabama Court of Criminal Appeals issued an opinion affirming petitioner's conviction and sentence. [App. B] On November 2, 1982, the Court overruled petitioner's application for rehearing.

Certiorari was granted by the Alabama Supreme Court as a matter of right pursuant to Alabama Rule of Appellate Procedure 39(c), and on February 11, 1983, that Court issued an opinion affirming the Alabama Court of Criminal Appeals decision in the case [App. A]. On February 11, 1983, the Alabama Supreme Court overruled petitioner's application for rehearing.

Thereafter, petitioner filed the petition for a writ of certiorari in this case, and on June 21, 1983 Justice Powell issued an order staying the scheduled June 24, 1983 execution pending consideration of the petition.

#### SUMMARY OF ARGUMENT

The petition raises two questions — whether petitioner's confessions were in fact voluntary, and whether he should have been granted a new trial because a complaint involving an unrelated incident that was filed against one of the police officers who took his confession was not revealed to him before trial. Both questions were correctly decided below. In any event, review of either of the two questions would involve a predominantly factual inquiry into whether controlling precedents were properly applied by the Alabama appellate courts. Neither question involves a Rule 17.1(b) or (c) situation, or is otherwise worthy of certiorari review by this Court.

## ARGUMENT

### THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari should be denied because the two issues raised in the petition were correctly decided in the Alabama appellate courts and neither is worthy of review by this Court on certiorari.

#### I. THE ISSUE INVOLVING THE VOLUNTARINESS OF PETITIONER'S CONFESSIONS WAS PROPERLY DECIDED BELOW AND PRESENTS NO QUESTION WORTHY OF REVIEW BY CERTIORARI

The first issue referred to in the petition concerns whether petitioner's confessions were voluntary. Pet. at 4. The relevant facts are set out in the following paragraphs.

Petitioner was arrested on August 28, 1981, and after being advised of his Miranda rights he confessed to participating in the robbery-murder but said that his co-defendant had been the triggerman. (R. 20-30, 248-251, 253-254, 316-386) His confession was tape-recorded, and after the tape was transcribed verbatim into a 30-page statement petitioner signed it and initialled each page. (R. 34-36, 254, 323, 331-333) Petitioner confessed to Montgomery Police Department Officers Ward and Davis. (R. 20-47, 58, 77-82, 248-271, 316-403) When asked by Officer Ward during the confession why he was admitting involvement in the crime, petitioner answered:

Because you know too much about the business. Somebody had to tell you something, you had to know something. In some of the things you picked out, you said, I know it could have come from one or two people. (R. 29)

The next day, petitioner was again advised of his Miranda rights, and he signed a written waiver form. (R. 30-40, 254-259, 325-332) Petitioner then confessed a second time. His second confession was also tape-recorded and then

reduced verbatim to writing, and petitioner signed it and initialled each page. (R. 30-33, 38-41, 260-263, 333-340) The second confession came after petitioner's co-defendant had contradicted parts of the first one. (R. 41-42, 259-260, 263, 334) In the second confession, petitioner admitted that he and not the co-defendant had shot each of the victims. (R. 259, 263, 392-397, 399, 402) Officer Ward was the one to whom petitioner made the second confession. (R. 20-47, 58, 248-271, 316-403, 336)

On August 31, 1981, after he had been read his rights again, petitioner was taken by police officers to his common law wife. Petitioner was allowed to talk with his wife, and he told her that his gun was at a neighbor woman's apartment where he had pawned it. He instructed his wife to get the gun from the woman and give it to the officers, and she did so. (R. 265-268, 405-410, 426-439) Ballistics tests later established that it was the murder weapon. (R. 273-287)

Prior to trial and during trial, petitioner attempted to have his confessions suppressed. (R. 3-85, 253-254) He said that he was innocent and that he had been coerced into confessing by the officers who he claimed had beaten and intimidated him. (R. 54-77, 441-508) His credibility was undercut more than a little by the fact that he had three prior felony convictions (R. 450) and had been in prison almost continuously since he was a teenager (R. 616). Petitioner's credibility and claim of innocence were further undercut by his admission that before his arrest he had possessed the gun that proved to be the murder weapon. (R. 448, 451-452)

When cross-examined by the District Attorney about how he could have supplied so many details about the crime during the taped confessions if those confessions were false as he claimed, petitioner swore that the officers had had the

statements typed up first for him to read out loud during the taping. (R. 472-475, 479-481) The State disproved that claim by calling as a witness the stenographer who typed the transcripts from the tapes, instead of vice versa. (R. 515-517)

The officers who had questioned petitioner testified and steadfastly denied mistreating or coercing petitioner in any way. (R. 42, 46, 53, 77-82, 251-252, 271, 327, 333-334, 413-414, 518-520) In addition, the State introduced photographs of petitioner taken immediately after he confessed which showed that he had not been beaten. (R. 511-515)

The only witness other than petitioner who even tried to support his story about the confessions was his common-law wife. (R. 419-439) She testified on direct that she thought he had been beaten after he was arrested (R. 420-421), but on cross-examination admitted that when she saw him he had no bruises, blood, contusions, swelling, and was not crying. (R. 423-425) She conceded that the sum total of her testimony was that his hair had been messed up, and she admitted that he could have done that himself. (R. 425, 439)

The Alabama Court of Criminal Appeals addressed and decided the confessions issue as follows:

Prior to trial and during trial, appellant attempted to have his confession suppressed, alleging that he had been coerced into confessing by the police officers who he claimed had beaten and intimidated him.

The overwhelming weight of the evidence, however, refutes appellant's allegations. Testimony by the police officers who questioned appellant demonstrates that appellant intelligently and voluntarily made his confessions free from any coercion or intimidation. Both the Miranda and voluntariness predicates were fully determined and established before appellant's confessions were admitted into evidence.

Thus, in line with Burks v. State, 353 So.2d 539 (Ala.Crim.App. 1977) and authority cited therein, appellant's confessions were in fact properly admitted. The issue of appellant's credibility in this matter was resolved by the jury.

William Bush v. State, No. 3 Div. 494 (Ala. Cr. App. Oct. 12, 1982), Ms. op. at 6 n. 5 [App. B]. The Alabama Supreme Court affirmed without further discussion of this specific issue, William Bush v. State, No. 82-131 (Ala. Feb. 11, 1983), Ms. op. at 2, which petitioner failed to raise before it.

This Court generally does not sit to review state court factfindings, see e.g., California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-112 (1980); N.L.R.B. v. Waterman S.S. Corp., 309 U.S. 206, 208 (1940), and the controlling factfinding of the Alabama appellate courts is that the overwhelming evidence at trial refutes any contention that petitioner's confession was involuntarily given and improperly admitted. Petitioner does not even contend that the Alabama appellate courts misapplied this Court's controlling precedents, but instead simply invites this Court "to review this issue in light of its many decisions on the subject." Pet. at 4. Unless this Court wants to squander its limited certiorari assets and become just another step on the direct appeal ladder, it should decline petitioner's open-ended invitation. See, Rule 17.1(b) and (c).

II. THE ISSUE INVOLVING THE UNDISCLOSED COMPLAINT AGAINST ONE OF THE POLICE OFFICERS WHO TOOK PETITIONER'S CONFESSION WAS PROPERLY DECIDED BELOW AND PRESENTS NO QUESTION WORTHY OF REVIEW BY CERTIORARI

The second issue referred to in the petition concerns whether petitioner should have been granted a new trial because of an undisclosed complaint about one of the officers who took petitioner's confessions. The circumstances

concerning those confessions are discussed on pp. 5 - 7 of this brief, above.

The tape recordings and transcripts of both confessions were admitted into evidence at trial. Among the State's other evidence was the testimony of Mrs. Pringle, the wife of petitioner's co-defendant. (R. 228-239) Mrs. Pringle testified that the day after the murders petitioner had confided in her that he (petitioner) had shot the victims because he did not want to leave any witnesses. (R. 233-234) The State's other evidence also included the testimony of the woman to whom petitioner had pawned the undisputed murder weapon two weeks before his arrest. (R. 509-511)

After petitioner was convicted and sentenced to death, he filed a motion for a new trial. (R. 690-697) The State filed an answer. (R. 702-709) An evidentiary hearing was held on the motion. (R. 627-657) After the hearing, petitioner's motion for a new trial was denied. (R. 730) The facts revealed by the new trial motion pleadings and the testimony at the evidentiary hearing are summarized in the following paragraphs.

Prior to trial, petitioner had filed a motion to produce which made some general requests and a number of specific requests. (R. 671-672) One of the general requests it made was for production of all matters that the State was required to produce under Brady v. Maryland, 373 U.S. 83 (1963). (R. 671) Although the record does not reflect a formal ruling on the motion to produce, the State did produce and disclose to petitioner prior to trial a number of items covered by the motion to produce. (R. 638-641, 650-653, 690)

One item which the State did not produce and disclose to petitioner was a letter concerning a complaint by a convicted felon about Montgomery Police Officer R. T. Ward, one of the officers to whom petitioner had confessed. (R. 652, 690) The complainant was Neil Martin who has nine prior convictions

involving moral turpitude, at least seven of which are felonies. (R. 702-703) In the complaint, Martin alleged that Officer Ward had abused him on February 3, 1981, in an unrelated incident involving one of Martin's many arrests. (R. 692)

Martin had complained about Officer Ward and other officers to Theodore Gibbs of the local chapter of the American Civil Liberties Union in May or June of 1981. (R. 630, 632-633) Gibbs wrote a letter dated August 14, 1981 to Montgomery Police Chief Swindall about Martin's complaint. (R. 630, 648-649) Gibbs' letter to Swindall reveals that he had no evidence to substantiate the complaint except for felon Martin's own allegations. (R. 691) Gibbs' letter was referred to the city attorney who answered it. (R. 631, 648) Somehow, the District Attorney's Office became aware of Martin's complaint (R. 642-644), although it apparently never saw the actual letter (R. 702). The District Attorney's Office was unable to pursue the matter because the complainant Martin refused to cooperate. (R. 643-645) Martin would not give the District Attorney's Office any information unless it agreed to help him on some pending robbery charges, something the District Attorney declined to do. (R. 643-645) .

A.C.L.U. member Gibbs followed the developments in the present case "very closely," having made the connection that the Officer Ward involved in this case was the same Officer Ward against whom felon Martin had made the complaint through Gibbs. (R. 635-636) Yet, Gibbs did nothing at all to inform petitioner's counsel about Martin's complaint until immediately after petitioner was convicted. (R. 632, 635-636) Then, on November 19, 1981, Gibbs rushed petitioner's attorney a letter by hand delivery. (R. 632, 635-636) The letter informed petitioner's counsel of the Martin complaint, informed him that an A.C.L.U. attorney thought he could use

it to get a new trial, and boasted that the A.C.L.U. "is opposed to capital punishment and has been in the vanguard fighting death penalty statutes." (R. 691) Although A.C.L.U. member Gibbs deliberately withheld the information during the trial, his letter to petitioner's counsel pointed out to counsel that now that the conviction was in "time is of the essence." (R. 691)

Gibbs' November 19, 1981 letter to petitioner's counsel was the first petitioner's counsel had heard of the Martin complaint. (R. 637) However, even though he was informed of it on November 19, petitioner's counsel did not mention the matter at the November 25 sentence hearing before the trial court. (R. 633) Instead, he waited until after the sentence hearing and after the trial court had sentenced petitioner to death to raise the matter.

At the evidentiary hearing on the motion for a new trial, Officer Ward testified that he had never abused or mistreated Neil Martin. (R. 653) Such complaints by arrested felons are common. (R. 654)

On appeal, the Alabama Court of Criminal Appeals addressed and decided the issue as follows:

Appellant's final allegation of error is that under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) the State was required to disclose that one of the police officers who took his confession had had a complaint lodged against him alleging brutality in an unrelated case by one Neal Martin, a nine-time convicted felon. This issue was raised by appellant for the first time in his motion for new trial. The trial court, after conducting a full evidentiary hearing and considering the totality of the circumstances in light of United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L.Ed.2d 342 (1976), denied appellant's motion. It should be noted that only hearsay allegations were forthcoming at the hearing in support of the motion. There was no demonstrable evidence presented that Martin had actually been mistreated in the earlier, unrelated case. In our opinion, the trial court's ruling on appellant's motion for new trial was in all respects correct.

We do not believe that the information sought, even if it had been brought to appellant's attention prior to trial, would have been "material" to appellant's case in any constitutional sense. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish 'materiality' in the constitutional sense." Agurs, 427 U.S., at 109-110. The prosecutor does not have a constitutional duty to deliver his entire file to defense counsel. "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." Agurs, 427 U.S., at 109.

Furthermore, assuming arguendo that the information sought by appellant was otherwise admissible, appellant's pre-trial general request for "all matters called for and required by Brady" is not significantly different from those cases where no request at all has been made. A general request for "all Brady material" gives the prosecutor no better notice than if no request is made. "If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor." Agurs, 427 U.S., at 107.

Where only a general request is made under Brady, the nondisclosure of material evidence does not result in automatic error requiring the trial court to order a new trial every time he is unable to characterize a nondisclosure as harmless under the harmless-error standard. As the Supreme Court held in Agurs, 427 U.S., at 112-113:

"The proper standard of materiality must reflect our overriding concern with the justice of finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is

already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." (Emphasis added).

Thus, even if the naked allegations that were made against the police officer in Martin's unrelated case were somehow considered to be material to this case, which we do not believe them to be, evaluating that omission in the context of the entire record, we find that the evidence of appellant's guilt is overwhelming. Considering the totality of the circumstances here involved, there is no reasonable doubt concerning appellant's guilt. The jury's verdict is well supported. The trial court was, therefore, correct in determining there was no justification for a new trial in this cause.

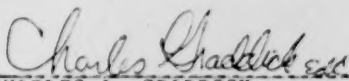
William Bush v. State, No. 3 Div. 494 (Ala. Cr. Oct. 12, 1982), Ms. op. at 6-8 (footnote omitted; emphasis in original) [App. B]. The Alabama Supreme Court affirmed without further discussion of this specific issue, William Bush v. State, No. 82-131 (Ala. Feb. 11, 1983), Ms. op. at 2 [App. A].

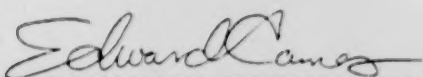
The Alabama appellate courts properly applied this Court's decision in United States v. Agurs, 427 U.S. 97 (1976), to the facts of this case, and in any event, the question of whether they did so is not worthy of certiorari review by this Court. See, Rule 17.1(b) and (c).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

  
\_\_\_\_\_  
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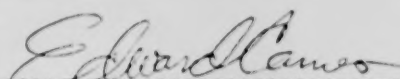
CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Hon. George W. Cameron  
246 So. Court Street  
Montgomery, Alabama 36104

I further certify that I have served all parties required to be served.

Done this 7th day of July, 1983.

  
\_\_\_\_\_  
EDWARD E. CARNES  
ALABAMA ASSISTANT ATTORNEY  
GENERAL

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT  
THE SUPREME COURT OF ALABAMA  
OCTOBER TERM, 1982-83

Ex parte William Bush

82-131

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CRIMINAL APPEALS

(Re: William Bush  
v.  
State of Alabama)

JONES, JUSTICE.

We granted Defendant's petition for review of the Court of Criminal Appeals' affirmance of his capital offense conviction and death sentence. The posture of the trial court proceedings and the facts of the case are fully set

out in the appellate court's opinion, and need not be repeated here. Our careful review of that opinion reveals that each of the issues addressed is resolved in accordance with well-established legal principles relating to Alabama's death penalty statute as pronounced by the Supreme Court of the United States and the appellate courts of this State.

Pursuant to the "plain error" mandate of the last paragraph of ARAP 39(k), however, our search of the record discloses one additional issue not raised by petitioner nor addressed by the Court of Criminal Appeals: Is misciting the code section in the indictment reversible error?

The problem arises because each count of the indictment cites § 13A-5-31(a)(2) as the code section violated. That code section is part of the 1975 capital punishment statute and is a proper citation for crimes occurring before July 1, 1981, the effective date of the 1981 capital punishment statute (now codified as §§ 13A-5-39 through 13A-5-59). The 1981 statute applies to crimes occurring after July 1, 1981. § 13A-5-57.

The indictment citation of § 13A-5-31(a)(2) is in error, because the crime involved in this case occurred on July 26, 1981, twenty-five days after the effective date of the 1981 capital punishment statute. Therefore, the applicable code section is § 13A-5-40(a)(2). Nonetheless, we hold that the technical error in citation is not of such legal significance as to require reversal.

Miscitation of a code section does not void an indictment which otherwise states an offense; and, in the absence of a showing of actual prejudice to the defendant, reference to the erroneous code section will be treated as mere surplusage. Mays v. City of Prattville, 402 So. 2d 1114, 1116 (Ala.Cr.App. 1981); Coker v. State, 396 So. 2d 1094, 1096 (Ala.Cr.App. 1981); Fitzgerald v. State, 53 Ala.App. 663, 665, 303 So. 2d 162 (1974); Allen v. State, 33

Ala. App. 70, 73, 30 So. 2d 479, petition struck, 249 Ala. 201, 30 So. 2d 483 (1947); accord, United States v. Kennington, 650 F. 2d 544 (5th Cir. 1981); Theriault v. United States, 434 F. 2d 212, 213 n. 2 (5th Cir. 1970), cert. denied, 404 U. S. 869 (1971).

The record not only fails to show that Defendant was prejudiced by the misciting of the statute, but it affirmatively shows that he was not prejudiced by it. When applied to the facts of this case, §§ 13A-5-31(a)(2) and 13A-5-40(a)(2) are materially identical; and the indictment adequately avers a violation under both sections, the punishment under both being the same.

To be sure, § 13A-5-40(a)(2) is broader than § 13A-5-31(a)(2) in that it encompasses a robbery-murder in which the person murdered is not the same as the victim of the robbery. That difference, however, is irrelevant here, because the indictment averred (consistent with the undisputed facts) that the murder victim in this case was the convenience store clerk who was robbed.

The only difference is that §13A-5-31(a)(2) is part of the 1975 statute (with its procedure as specified in that statute and in Beck v. State, 396 So. 2d 645 (Ala. 1980)), while § 13A-5-40(a)(2) is part of the 1981 statute (with its procedure spelled out in §§ 13A-5-43 through 13A-5-53), which is different in some respects, not here material.

Because the indictment, though citing the 1975 statute, adequately describes the offense under the applicable 1981 statute, and because the punishment is identical under both, the only conceivable claim of prejudice lies in this: That the misciting of the statute somehow led Defendant to believe he was to be tried under the procedure prescribed by the 1975 act, as supplemented in Beck, when in fact he was tried under the 1981 act procedure. The record, conclusively refuting any such claim, affirmatively shows that the

trial judge and counsel for the respective parties, well before the trial date, all acknowledged that the trial, and the subsequent sentencing procedure, would be governed by the 1981 capital punishment statute. It is important that Defendant and his counsel knew that the capital offense of which he, the Defendant, was charged, and the procedure by which he was tried and sentenced, were the capital offense and procedure prescribed by the 1981 statute, notwithstanding the technical citation error in the indictment.

In conclusion, we emphasize that Defendant's failure to raise the error of citation issue, while weighing against Defendant as to any possible claim of prejudice, serves as no impediment to our scope of review pursuant to the "plain error" mandate in death penalty cases. Accordingly, we find no irregularity nor impropriety in either the trial proper or in the sentencing procedure "adversely affecting the right of the defendant." § 13A-5-53. Likewise, extending our inquiry into "whether death was the appropriate sentence in the case," as mandated by § 13A-5-53(a), including the Beck mandate to "examine the penalty ... in relation to that imposed upon his accomplices, if any," we concur with the appellate court's conclusion that Bush's death sentence was properly arrived at and is appropriate, being neither excessive nor disproportionate under the circumstances.

AFFIRMED.

All the Justices concur.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 14 day of Feb. 1983

*Dorothy F. Norwood*

Acting Clerk, Supreme Court of Alabama

OCT 12 1982

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

3 Div. 494

William Bush

v.

State of Alabama

Appeal from Montgomery Circuit Court

TYSON, JUDGE

The appellant was indicted for and convicted of the capital offense of murdering Larry Dominguez, the cashier of a convenience store in Montgomery, Alabama, by shooting him with a pistol during a robbery in the first degree, in violation of Alabama Code § 13A-5-40(a) (2) (1975). After a separate hearing

on aggravating and mitigating circumstances, the jury returned a verdict unanimously recommending that appellant's punishment be "fixed at death."

Subsequently, the trial court weighed the aggravating and mitigating circumstances, pursuant to Alabama Code § 13A-5-47 (1975) and sentenced appellant to death. The trial court entered specific written findings in support of the death sentence concerning the existence or nonexistence of each aggravating circumstance enumerated in § 13A-5-49, Code of Alabama, and also each mitigating circumstance enumerated in § 13A-5-51, and certain other mitigating circumstances which were offered pursuant to § 13A-5-52.<sup>1/</sup>

Also pursuant to Alabama Code § 13A-5-47(d) (1975), the trial court made and entered of record the following findings of fact regarding this capital offense which we hereby adopt as correct for the purposes of this opinion:

"On July 26, 1981 at approximately 3:05 a.m. the Defendant, William Bush, and Edward Pringle entered a convenience store--Majik Mart--on Carter Hill Road in Montgomery, Alabama. Edward Pringle has capital cases pending against him in this Circuit.

"William Bush pointed a pistol at the witness, Tony Holmes, and forced him to the rear of the store where the cashier, Larry Dominguez, was using the restroom. When Dominguez opened the bathroom door, William Bush shot both Tony Holmes and Dominguez with the pistol. Bush shot Holmes in the face and Dominguez in the chest area. Bush then walked to the front of the store and tried to get into the cash register. When Larry Dominguez stumbled out of the bathroom, William Bush shot him again, this time in the face. Larry Dominguez died from the wounds he received. Bush shot Holmes and Dominguez so that there would be no witnesses to the robbery of the convenience store. Bush took two bags of Zodiac sign tags out of the Majik Market.

"After the shootings at the Carter Hill Road convenience store, Bush and Pringle drove to another convenience store. The second convenience store was a Seven-Eleven store on Narrow Lane Road

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<sup>1/</sup>The trial court's determination of sentence, dated November 30, 1981, is hereto made a part hereof and attached as Appendix A. (Volume 4, R. 683-687).

in Montgomery, Alabama. Bush bought some cigarettes from the cashier, Thomas Adams, to get him to open the cash register. Then Bush forced Adams to go to a small room--an office area behind the counter. Bush shot Adams in the head with the same pistol he had previously used to shoot Tony Holmes and Larry Dominguez. Thomas Adams died from the wound he received. Bush and Pringle took the money from the cash register at the Seven-Eleven Store." (R. 682-683).

I

The appellant asserts that his demurrer to the indictment should have been granted because the indictment failed to aver the "time" of the offense. Appellant argues on this appeal, as he did by way of demurrer, that in the time period between the respective dates of the United States Supreme Court decision in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) and the Alabama Supreme Court decision in Beck v. State, 396 So.2d 645 (Ala. 1980), June 20, 1980 and December 19, 1980, there was no statute or other law providing for the death penalty in Alabama. The appellant contends that since the time of the offense is not averred in the indictment the offense could have "happened at a time between June 20, 1980 and December 19, 1980," a time period when in appellant's estimation there was no death penalty provision in this state. (R. 667). We disagree.

The essential premise of appellant's argument, that Alabama had no law providing for capital punishment for offenses committed in the interval between the United States Supreme Court decision in Beck v. Alabama, supra, and the subsequent decision by the Alabama Supreme Court in Beck v. State, supra, is faulty. This is so for two reasons:

First, the United States Supreme Court opinion in Beck v. Alabama, supra, did not invalidate Alabama's capital felony statute in its entirety, but simply struck down as unconstitutional that part of the statute which did not permit the jury to consider a verdict of guilt of "a lesser included offense" when the evidence would have supported such a verdict. The Alabama Supreme Court in Beck v. State, supra, judicially severed the preclusion clause which contained this, from the statute in order that the

statute might comport with constitutional requirements. Thus, the changes in the statutes which were wrought by Beck v. Alabama, supra, and Beck v. State, supra, were procedural in nature and not substantive, such that Alabama was left without a death penalty provision for capital offenses committed in the interim period referred to by appellant.

Secondly, in the recent case of Percy Leo Dobard v. State, [Ms. 2 Div. 305, June 29, 1982] \_\_\_ So.2d \_\_\_ (Ala.Crim.App. 1982), this court affirmed the death sentence of a defendant convicted of committing a capital offense which occurred on June 21, 1980, one day after the United States Supreme Court decision in Beck v. Alabama, supra. Thus, it was recognized in Dobard, supra, albeit tacitly, that Alabama did have a death penalty law in full force and effect for capital felonies committed during the period in question. Therefore, appellant's contention that the capital offense in the present case could have been committed during a time when there was no law providing for the death penalty in Alabama is unfounded, and without legal merit.

Moreover, the general rule, and the rule that is controlling in the instant case, is that it is not necessary to state in an indictment the precise time at which the offense was committed. Kelley v. State, 409 So.2d 909, 912 (Ala.Crim.App. 1981); Shiflett v. State, 37 Ala.App. 300, 67 So.2d 284 (1953); Alabama Code § 15-8-30 (1975). We find none of the exceptions to the general rule applicable to appellant's argument.

In Deep v. State, 414 So.2d 141, 147 (Ala.Crim.App. 1982), this court reiterated what Judge Harris so definitively stated in Summers v. State, 348 So.2d 1126 (Ala.Crim.App.), cert. denied, 348 So.2d 1136 (Ala. 1977), cert denied, 434 U.S. 1070, 98 S.Ct. 1253, 55 L.Ed.2d 773 (1978) as follows:

"The constitutional right of an accused to demand the nature and cause of the accusation against him is not a technical right, but is fundamental and essential to the guaranty that no person shall be deprived of his liberty except by due process of law, nor be twice put in jeopardy for the same offense.

"An indictment should be specific in its averments in four prime aspects to insure this guaranty: (a) to identify the accusation lest the accused should be tried for an offense different from that intended by the grand jury; (b) to enable the defendant to prepare for his defense; (c) that the judgment may inure to his subsequent protection and foreclose the possibility of being twice put in jeopardy for the same offense, and (d) to enable the Court, after conviction, to pronounce judgment on the record.

"The indictment in this case is couched in language so clear that any person of common understanding would know that the crime of robbery was charged against appellant."

Despite appellant's allegation that the time of the offense should have been averred, a plain reading of the indictment demonstrates that it is "couched in language so clear that any person of common understanding would know" that the appellant was charged with committing the capital felony of murder during a robbery in the first degree or attempt thereof.

Having reviewed all the circumstances involved, we have determined that the trial court properly overruled the demurrer on the grounds alleged therein.

## II

There is no requirement under Alabama's new capital felony statute<sup>2/</sup> that the jury make specific findings as to the existence of aggravating circumstances during the sentencing phase of the proceedings. The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only. Alabama Code § 13A-5-46 (1975).

Any such contention that the jury should make specific findings enumerating the aggravating circumstances it found to exist was foreclosed by Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) which upheld the Florida statute and its

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<sup>2/</sup>Alabama Code §§ 13A-5-39 through 13A-5-59 (1975).

advisory verdict provisions, which also do not require the verdict to specify the aggravating circumstances relied upon by the jury. It is sufficient that the trial court, which is in no way bound by the jury's recommendation concerning sentence,<sup>3/</sup> is required to enter specific written findings concerning the existence or non-existence of each aggravating circumstance.<sup>4/</sup>

### III

Appellant's final allegation of error is that under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) the State was required to disclose that one of the police officers who took his confession had had a complaint lodged against him alleging brutality<sup>5/</sup> in an unrelated case by one Neal Martin, a nine-time convicted felon. This issue was raised by appellant for the first time in his motion for new trial. The trial court, after conducting a full evidentiary hearing and considering the totality of the circumstances in light of United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), denied appellant's motion. It should be noted that only hearsay allegations were forthcoming at the hearing in support of the motion. There was no demonstrable evidence presented that Martin had actually been mistreated in the earlier, unrelated case. In our opinion, the trial court's ruling on appellant's motion for new trial was in all respects correct.

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<sup>3/</sup> Alabama Code § 13A-5-47(e) (1975).

<sup>4/</sup> Alabama Code § 13A-5-47(d) (1975)

<sup>5/</sup> Prior to trial and during trial, appellant attempted to have his confession suppressed, alleging that he had been coerced into confessing by the police officers who he claimed had beaten and intimidated him.

The overwhelming weight of the evidence, however, refutes appellant's allegations. Testimony by the police officers who questioned appellant demonstrates that appellant intelligently and voluntarily made his confessions free from any coercion or intimidation. Both the Miranda and voluntariness predicates were fully determined and established before appellant's confessions were admitted into evidence.

Thus, in line with Burks v. State, 353 So.2d 539 (Ala.Crim.App. 1977) and authority cited therein, appellant's confessions were in fact properly admitted. The issue of appellant's credibility in this matter was resolved by the jury.

We do not believe that the information sought, even if it had been brought to appellant's attention prior to trial, would have been "material" to appellant's case in any constitutional sense. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish 'materiality' in the constitutional sense." Agurs, 427 U.S., at 109-110. The prosecutor does not have a constitutional duty to deliver his entire file to defense counsel. "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." Agurs, 427 U.S., at 109.

Furthermore, assuming arguendo that the information sought by appellant was otherwise admissible, appellant's pretrial general request for "all matters called for and required by Brady" is not significantly different from those cases where no request at all has been made. A general request for "all Brady material" gives the prosecutor no better notice than if no request is made. "If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor." Agurs, 427 U.S., at 107.

Where only a general request is made under Brady, the nondisclosure of material evidence does not result in automatic error requiring the trial court to order a new trial every time he is unable to characterize a nondisclosure as harmless under the harmless-error standard. As the Supreme Court held in Agurs, 427 U.S., at 112-113:

"The proper standard of materiality must reflect our overriding concern with the justice of finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor

importance might be sufficient to create a reasonable doubt." (Emphasis added).

Thus, even if the naked allegations that were made against the police officer in Martin's unrelated case were somehow considered to be material to this case, which we do not believe them to be, evaluating that omission in the context of the entire record, we find that the evidence of appellant's guilt is overwhelming. Considering the totality of the circumstances here involved, there is no reasonable doubt concerning appellant's guilt. The jury's verdict is well supported. The trial court was, therefore, correct in determining there was no justification for a new trial in this cause.

#### IV

In addition to reviewing this case for any error involving the conviction, this court is also statutorily required to review the propriety of the death sentence. Alabama Code § 13A-5-53 (1975). Upon review of the sentencing proceedings, we have found no error adversely affecting appellant's constitutional rights. The trial court's findings concerning the aggravating and mitigating circumstances are fully supported by the evidence. We also determine that the "sentence of death" is proper punishment in this case.

Referring to Appendix A, which is attached to this opinion, the trial court found aggravating circumstances codified at Alabama Code § 13A-5-49 (2), (4) and (8) (1975). As stated above, these findings were proper.

Robbery, for which appellant was previously convicted in 1970, is by definition a felony involving the use or threat of violence to the person. Peagler v. State, 353 So.2d 59, 60 (Ala.Crim.App. 1977).

Secondly, the aggravating circumstances specified in § 13A-5-49(4) "shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of

subsection (a) of § 13A-5-40." Alabama Code § 13A-5-50 (1975).

And thirdly, for the reasons set out by the trial court, this capital offense was especially heinous, atrocious or cruel when compared to other capital offenses. Execution-type slayings evincing a cold, calculated design to kill, fall into the category of heinous, atrocious or cruel. Vaught v. State, 410 So.2d 147 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). We recognize that an instantaneous death caused by gunfire is not ordinarily a heinous killing. Odom v. State, 403 So.2d 936 (Fla. 1981). However, when a defendant deliberately shoots a victim in the head in a calculated fashion to avoid later identification, after the victim has already been rendered helpless by gunshots to the chest, such "extremely wicked or shockingly evil" actions may be characterized as especially heinous, atrocious, or cruel. Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978).

Comporting with the mandates outlined in Alabama Code § 13A-5-53(b) and (c) (1975) we have determined:

- (1) That the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor;
- (2) That after an independent weighing of the aggravating and mitigating circumstances at this appellate level, death is the proper sentence; and
- (3) That the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

In conclusion, we have answered each issue raised by appellant on this appeal. In addition, we have searched the entire record for plain error, as required by state law ARAP, Rule 45A. We find no error that has adversely affected appellant's substantial rights. The trial court's judgment of conviction sentencing appellant to death is due to be and is, hereby, affirmed.

AFFIRMED.

All the Judges concur.

## APPENDIX A

SPECIFIC FINDINGS CONCERNING THE  
EXISTENCE OR NONEXISTENCE OF EACH  
AGGRAVATING CIRCUMSTANCE ENUMERATED  
IN SECTION 13, ACT NO. 81-178; AND  
SPECIFIC FINDINGS AS TO THE EXIS-  
TENCE OR NONEXISTENCE OF EACH MITI-  
GATING CIRCUMSTANCE WHETHER ENUMER-  
ATED IN SECTION 13, ACT NO. 81-178  
OR OTHERWISE PRESENTED PURSUANT TO  
SECTION 14, ACT NO. 81-178, SUPRA.

### ENUMERATED AGGRAVATING CIRCUMSTANCES

The capital offense was not committed by a person under sentence of imprisonment.

The Defendant was previously convicted of the offense of robbery in March, 1970. The presentence report also shows that in 1976 Defendant was convicted of violating the Federal Firearms Act. While the Defendant was on the stand during the instant trial, it was shown that the Federal Firearms Act violation involved a sawed-off shotgun.

The instant capital offense involved three victims. This offense is not considered by the Court to invoke the aggravating circumstance set forth in Section 11(c), Act No. 81-178, involving "a great risk of death to many persons."

The capital offense was committed while the Defendant was engaged in or was an accomplice in the commission of a robbery.

Under the evidence presented the Court does not find or consider that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody within the purview of Section 11(e), Act No. 81-178.

Under the evidence presented, the Court does not find or consider that the capital offense was committed for pecuniary gain within the purview of Section 11(f), Act No. 81-178, supra.

The Court does not find or consider under the evidence presented that the capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws within the purview of Section 11(g), Act No. 81-178, supra.

The Court does find from the evidence presented at trial that the capital offense was especially heinous, atrocious or cruel compared to other capital offenses. This finding is based upon the evidence of the execution type slaying here involved, coupled with the shooting of Larry Dominguez after this victim had already been shot and was stumbling or staggering in the store area. The evidence shows that the murder was committed so that the Defendant could eliminate an eyewitness to the robbery. The shooting of Tony Holmes in the face as part of the robbery and the shooting of Thomas Adams in the head, as part of the same criminal episode, emphasize and underscore the heinous, atrocious and cruel nature of the capital offense. The conclusion of the Court as to the heinous, atrocious or cruel nature of the offense is made after a careful review of all of the evidence and after considering the totality of all of the circumstances of this case.

MITIGATING CIRCUMSTANCES ENUMERATED  
AND OTHERWISE PRESENTED

The evidence before the Court establishes that the Defendant does have a significant history of prior criminal activity, including a robbery conviction and a conviction for violation of the Federal Firearms Act involving a sawed-off shotgun. There is also evidence of a conviction for grand larceny. The capital offense now before the Court is the Defendant's fourth felony conviction.

The Defendant contends in his written statement that he was under the influence of narcotics at the time of the capital offense. The Defendant denied such influence at trial.

The preponderance of the evidence does not show that Defendant was under the influence of extreme mental or emotional disturbance at the time of the capital offense.

The preponderance of the evidence establishes that the victim, Larry Dominguez, was not a participant in the Defendant's conduct, and the preponderance of the evidence further establishes that the victim did not consent to the Defendant's conduct.

The evidence establishes that the Defendant was a major participant in the capital offense and that the shootings were done by him. The evidence establishes that he shot the victims, Dominguez, Adams and Holmes.

The preponderance of the evidence establishes that the Defendant was not under extreme duress at the time of the capital offense.

The preponderance of the evidence further establishes that the Defendant was not under the substantial domination of another person.

The Defendant himself shot the three victims involved. Bush himself took the property from the Majik Market.

In addition, the Defendant, William Bush, carefully saw to it that Thomas Adams, the victim at the Seven-Eleven Store, opened the cash register before shooting him.

The preponderance of the evidence establishes that the Defendant did have the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

The preponderance of the evidence establishes that this capacity was not impaired.

In the Court's judgment, from the preponderance of the evidence presented, the Defendant, William Bush, knew full well what he was doing and that what he was doing was wrong. He stated to a witness that he shot the victims so that there would be no eyewitness to his criminality.

The evidence establishes that the Defendant was thirty-one years of age at the time of the capital offense.

In addition to the above enumerated mitigating circumstances, the Defendant, at the sentence hearing conducted by the Court, was given the opportunity to present any other evidence of mitigating circumstances and to make any statement of mitigating circumstances. The Defendant, through counsel, asked the Court to consider as a mitigating circumstance the fact that William Bush has been involved with the law since 1965 or since he was some fifteen years of age. Defendant, William Bush, was incarcerated in the Mt. Meigs Juvenile Facility in 1965. Counsel for the Defendant states in substance that the system has contributed to the present problems of the Defendant, William Bush. The Defendant was given a ten year penitentiary sentence in 1969 for robbery and received three years in the Federal penitentiary in 1976 for violation of the Federal Firearms Act. Defendant received another three year sentence in 1978 for grand larceny.

The Defendant himself stated to the Court when given an

opportunity to make any statement that he so desired, that he is not guilty and that there was an error in the trial.

#### CONCLUSION

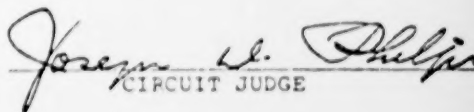
All of the proper evidence having been received, the arguments given and statements made, the Court proceeds with its task of weighing the aggravating and mitigating circumstances and balancing these circumstances against each other.

The Court has not merely or mechanically tallied the items for or against the Defendant. The Court has weighed each individual aggravating circumstance as it applies to William Bush individually, and the Court has weighed such aggravating circumstances collectively. The Court has weighed each individual mitigating circumstance as it applies to William Bush individually, and has weighed the mitigating circumstances collectively. The consideration given by the Court has been specifically directed to William Bush as an individual and to the instant charge against him.

It is the conclusion of this Court that the aggravating circumstances overwhelmingly outweigh the mitigating circumstances. Accordingly, the Court accepts the recommendation of the jury that the penalty of death be imposed upon William Bush.

Formal sentencing be and is hereby set for 10:00 a.m., December 3, 1981.

DONE this the 30th day of November, 1981.

  
CIRCUIT JUDGE